Supreme Court, U.S.
FILED

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR A. LABOUR,

Petitioner,

vs.

AMERICAN STATES INSURANCE COMPANY
and ROYAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in upholding the District Court's decision to grant summary judgment in favor of two insurance carriers and against an insured, in an environmental clean up coverage dispute over who should pay for mandated clean up costs for subsurface soil contamination arising from the conduct of a metals plating business which involved long term splashing and dripping of toxic chemicals, but where the evidence also showed that some of the pollution damage resulted from three large, sudden and accidental spills which would otherwise have been covered by the insurance?

2. Whether the Court of Appeals erred when it failed to follow the requirements of the United States Supreme Court set forth in United States v. Diebold, Inc., 369 US 654, 8 L.Ed.2d 176, 82 S.Ct. 993 (1962) which requires that, at summary judgment, lower courts must give the non-moving party the benefit of all reasonable and logical inferences from the facts adduced?

3. Whether the Court of Appeals erred when it failed to follow the established and applicable California decisional law of Montrose v. Superior Court, 6 Cal.4th 287 (1993) and Vann v. The Travelers Companies, 39 Cal. App. 4th 1610 (1995) which require that under California law, summary judgment must be denied unless the insurer can establish *the absence of any potential* for coverage?

LIST OF ALL PARTIES

All of the parties are listed in the case caption except Dale Carter, Alice Kazanjian, Richard Perry, Arlene Perry, Sacramento Plating Company and RAR Marketing. Richard Perry, Arlene Perry, Sacramento Plating Company and RAR Marketing filed bankruptcy during the pendency of the district court case, did not oppose the summary judgment motion, and did not appeal from the district court's decision granting summary judgment, although they were also insured by the same insurance carriers under separate but identical policies of insurance. Only Labour filed an opposition to the summary judgment motion. Copies of this Petition are being served on all parties and counsel, including counsel for Insurance Environmental Litigation Association, a trade association of property and casualty insures, *Amicus*, below.

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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1996

ARTHUR A. LABOUR, *Petitioner,*

v.

AMERICAN STATES INSURANCE COMPANY
and ROYAL INSURANCE COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Arthur Labour hereby respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on October 25, 1996. A timely petition for rehearing was denied by the Ninth Circuit Court of Appeals on December 4, 1996.

OPINIONS BELOW

The decision of the District Court is reported as American States Ins. Co. v. Sacramento Plating, Inc., 861 F. Supp. 964, 94 Daily Journal DAR 12868. The Decision of the Court of Appeals was issued on a "Not For Publication" basis. The decision of the Court of Appeals and the Order on the Petition for rehearing are set forth in Appendix A to this Petition.

BASIS FOR JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered in this action on October 25, 1996. A timely petition for rehearing was denied by the Ninth Circuit Court of Appeals on December 4, 1996. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment V provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ".

STATEMENT OF THE CASE

Basis of Federal Jurisdiction in the District Court And Facts Material to Consideration Of the Questions Presented

Subject matter jurisdiction in the District Court was properly based on diversity of citizenship under 28 U.S.C. § 1332. Plaintiff American States Insurance Co. was an Indiana corporation. Defendants were all California residents. Cross-Defendant Royal Insurance Company was an Illinois corporation.

I
Introduction

It is the contention of Petitioner/Appellant Labour that the District Court and the Court of Appeals below failed to follow California substantive law, as determined by the California Supreme Court in Montrose v. Superior Court, 6 Cal. 4th 287 (1993) and as further demonstrated in Vann v. Travelers Companies, 39 Cal. App. 4th 1610 (1995).[1] At issue in the case below, which was decided on summary judgment, was the question of whether, under the facts of the case, insurance coverage for environmental pollution damages was excluded by certain exclusionary language of certain commercial general liability policies issued in the early and mid-1980's.

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[1] Federal Courts of Appeal will follow state appellate court decisions absent compelling evidence that the State's Supreme Court would decide differently. Intex v. United Nat. Ins. Co. 23 F3d 254 (9th Cir 1994).

The facts demonstrated that pollution of the soil below the concrete slab floor of a metals plating shop arose from four causes. One cause was the long term and gradual dripping and splashing of toxic chemicals onto the shop floor during normal operations. It is not disputed that pollution from this cause would not be covered under the applicable insurance policies. However, the evidence also clearly demonstrated that there were three additional and at least equally significant causes; causes for which insurance coverage should properly have been provided. These three additional causes arose from three large, isolated, infrequent, sudden and accidental incidents where the contents of chemical tanks containing hundreds of gallons of pollutants were also accidentally spilled and discharged onto the shop floor. The evidence showed that the shop floor was so degraded that it permitted the spills to escape into the soils beneath the slab floor. The insurance carriers and the District Court below at summary judgment denied insurance coverage to Petitioner/Appellant Labour for the three large sudden and accidental spills and refused to treat the three incidents as covered events because the regular business practices at the shop involved long term use and spillage of toxic chemicals. The Court of Appeals affirmed.

The decisions below failed to afford Labour the benefit of all reasonable and logical inferences from the facts adduced and failed to follow California substantive law on the subject. In particular, the Court of Appeals Memorandum decision (Appendix A, pg. A-1) asserts that "uncontroverted evidence in the record indicates (the 1981, 1984 and 1985) spills were not unexpected". Id. at A-5. The decision also asserts that "(t)he evidence unequivocally demonstrated that the spillage onto the floor occurred over a long period of time."

(Emphasis added). Id. at A-6. As will be shown below, and as has been argued to the Court of Appeals, had the Court of Appeals given Labour the benefit of all reasonable and logical inferences from the facts adduced, and had the Court fully considered all the evidence, the Court could not have concluded that the evidence was "uncontroverted" and "unequivocal".

II
The Court Overlooked Montrose V. Superior Court And Vann V. Travelers

The decisions below overlooked and failed to follow California substantive law, as determined by the California Supreme Court in Montrose v. Superior Court, 6 Cal.4th 287 (1993) and as further demonstrated in Vann v. The Travelers Companies, 39 Cal. App. 4th 1610 (1995). These California court decisions demonstrate that when considering the propriety of awarding summary judgment in favor of a commercial general liability carrier which has denied insurance coverage for damages arising from pollution, the fact that regular business practices of the insured involved long term use and spillage of toxic chemicals" could **not** eliminate the possibility that at least some of the pollution damage might have resulted from accidental causes." (Montrose, pg. 305). (Emphasis added). To prevail at summary judgment, under California law, "the insurer must establish *the absence" of any potential for coverage.* (Id., pg. 300). The evidence adduced, when properly considered, does not establish the "absence of any potential for coverage"; indeed, the Perry Declaration (Excerpts of Record/ Court of Appeals, Tab 67) and "tell-tale

lead"[2] demonstrated in a consultant's report[3] proves the very existence of a potential for coverage based on the three spills in question. The three spills in question demonstrate that at least some of the pollution damage resulted from these three incidents; incidents which were "sudden and accidental", when all the evidence is properly considered. Thus, under California law, summary judgment should have been denied.

Although the District Court and the Court of Appeals in the case at bar relied heavily upon the case of Smith v. Hughes Aircraft, 22 F. 3d 1432 (9th Cir, 1993), neither District Court Judge Shubb (in American States Ins. Co. v. Sacramento Plating (86 F. Supp. 964) nor the Ninth Circuit Court of Appeals in Smith v. Hughes cited or appeared to have considered Montrose v. Sup. Ct., which had been decided a mere four days before the Court of Appeals decided Smith v. Hughes and six months before it was amended on rehearing.

Furthermore, Vann v. Travelers (a case decided by the California Court of Appeals in October of 1995 and which cites and discusses Montrose v. Superior Court) also confirms

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[2] Elevated levels of lead were found in the soils beneath the concrete slab. This fact was referred to below as the "tell-tale lead" for the following reasons; Perry took over metal plating operations at the site in 1963; during Perry's operations, he did not use lead during his operations from 1963 to the cessation of business in 1989; yet elevated lead was found in the soils beneath the slab. The clear inference is that the lead in solution escaped through the degraded slab floor, thereby establishing that the slab floor was degraded before the three incidents in question.

[3] Excerpts of Record/ Court of Appeal, Tab 86, pg. BC 000713)

that for a court in California to properly consider a summary judgment motion, the court **must look not to whether noncovered acts predominate . . . but to whether there is any potential for liability.** (pg 1613). If the evidence shows that the pollution was caused **"in part, by a condition that developed so rapidly it could properly be described as a "sudden" event", then summary judgment is improper."**

Of significance is the fact that the Court in Vann, when offering an example of a "sudden and accidental" event, noted that the words "sudden and accidental" should be given a "common, ordinary meaning, relating to a release of toxic materials that is short in duration, **such as a burst storage tank**." (pg. 1613). In the case at bar, the evidence adduced regarding the three spills in question showed that on two specific occasions a **storage tank liner ruptured** and on the third occasion a storage tank was inadvertently **allowed to overflow during a filling operation**. In each instance, according to the Perry Declaration, toxins were released onto the cement floor at a specific point in time, *to wit*, "Spring, 1981"; "June, 1984"; and "May, 1985". The evidence further showed that at the time of each of the three spills in question Perry believed the chemical spills went down the drain and into the sewer. However, it may be inferred from the facts adduced, (particularly from the evidence of the "tell-tale" lead in the soil beneath the slab in higher than background levels and the fact that lead was not used by Perry), that the cement floor was degraded prior to the three spills in question and thereby provided a "pollution track" through the cement to the underlying soils.

The Vann Court also noted, citing another California

Supreme Court case, that "(a)ny doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor" (Vann, at page 1618, citing Horace Mann Ins. Co. v. Barbara B., 4 Cal.4th 1076, 1081). The decisions by the courts below in the case at bar overlooked both Montrose v. Superior Court and Vann v. Travelers and the decisions below fail to follow California law.

III
The Decisions Overlooked and Failed to Afford Labour The Benefit of All Reasonable and Logical Inferences From the Facts Adduced

The decisions below also overlooked and failed to afford Labour the benefit of all reasonable and logical inferences from the facts adduced. In particular, the decision by the Court of Appeals wrongly asserts that "uncontroverted evidence in the record indicates (the 1981, 1984 and 1985) spills were not unexpected". The decision also wrongly asserts that "(t)he evidence unequivocally demonstrated that the spillage onto the floor occurred over a long period of time." (Emphasis added). Had the Court of Appeals considered all the evidence and had it given Labour the benefit of all reasonable and logical inferences from the facts adduced, the Court could not have concluded that the evidence was "uncontroverted" and "unequivocal".

Undoubtedly, the Court of Appeals looked to paragraph 12 of the Perry Declaration. (Excerpts of Record/ Court of Appeals, Tab 67). Paragraph 12 reads as follows:

> "12. The tank content losses described above were not reported to any governmental

> agencies or to any insurance companies or insurance brokers or agents. These events were not considered insurable by me at the time they occurred. They arose from general business hazards which I **expected** to occur in SACRAMENTO PLATING, INC.'s operations at the Site, even thought I did not want them to happen since replacement of any chemical bath solutions is a substantial business expense. These incidents involving loss of tank contents as well as the daily splashing and dripping of chemicals from the baths during the plating of bumpers and other processed parts were a **normal part** of the business at the Site throughout the time it was occupied by me and operated as SACRAMENTO PLATING, INC." (Emphasis added).

At first blush, one might interpret paragraph 12 to mean that the three polluting events in question were "expected" and that they were a "normal part" of business operations. However, a careful reading of paragraph 12 and a careful review of the other facts attested to by Perry tend to support a contrary conclusion, as will be shown below. Summary Judgment should be denied where an issue of fact arises from the "countering inferences" which are permissible from evidence accepted as true. Cameron v. Vancouver Plywood Corp., 266 F2d 535 (CA9, 1959). It is the Perry Declaration and this paragraph in particular that must be read with an understanding of who the "messenger" of this message truly was. Perry was also an insured, but filed bankruptcy and therefore did not oppose the summary judgment motion. The

Perry Declaration is on the pleading paper of the law firm and attorney for the one of the insurance carriers. The name of the firm then representing the insurance carrier, (not Perry's own attorney) is printed on the bottom of each page of Perry's Declaration. So although one might be tempted to interpret paragraph 12 to mean that the three polluting events in question were "**expected**" and that they were a "**normal part**" of business operations, a close reading of paragraph 12 together with the balance of the Perry Declaration shows that the evidence was not "uncontroverted" and was not "unequivocal", as the Court of Appeal's Decision claims and as Perry's Declaration attempts to conclude.

In this regard, in particular, the evidence shows "countering inferences". Perry was in charge of and operated his business at the site from 1963 to 1988 (Perry Dec., ¶ 1). Under Perry's supervision, the electroplating processes occurred on a full-time daily basis for the 25 year period from 1963 to 1988. (Perry Dec., ¶ 5). During the electroplating process, parts were immersed in tanks containing chemical baths and the parts were moved by hand from bath to bath. (Perry Dec., ¶ 7). In moving the parts from bath to bath, chemicals in liquid form would normally splash and/or drip off the parts onto the wooden catwalk surfaces and to the flooring. (Perry Dec., ¶ 7). During the 25 year period of operations by Perry, Perry could only recall three incidents where loss of chemical bath liquids occurred (other than during the course of daily operations). (Perry Dec., ¶ 11).

Clearly, if only three such incidents with "large" releases occurred over a twenty five year period, those three incidents were not the "norm". The "norm", as Perry's Declaration shows, was for the contents of a chemical tank to

remain in the tank, except for the drips that occurred as parts were being moved. **Here, referring to the three spills in question, the District Court noted that "large amounts" of toxins were "infrequently" released onto the floor.** (861 F. Supp. 964, 970). Lumbermans Mut. v. Belleville Ind., 938 F .2d 1423, 1428 (1st Cir, 1991) teaches that a "coverable occurrence would be clearly identifiable as sudden and accidental because it would be a marked departure from normal operations". (Emphasis added). Where pollution is "part and parcel of daily conduct, there is the possibility of infinite variations on the usual theme, polluting events are likely to occur that are on the fringe of normal operations" (pg. 1428) and thus a microanalysis of a continuous pattern of pollution would result in an "ill-fated effort to distinguish between virtually indistinguishable occurrences." (Pg. 1428). However, the three "large" and "infrequent" spills in the case at bar here are very much distinguishable from frequent dripping and splashing which occurred on a daily basis. The three spills clearly were a "marked departure from normal operations". As the District Court noted, the three spills in question resulted in "large amounts" of toxins being "infrequently" released onto the floor. (861 F. Supp. 964, 970).

This is very much unlike Smith v. Hughes. The Court of Appeals in Smith v. Hughes said that the "evidence unequivocally demonstrates that the pollution was gradual". The Court of Appeals would not permit Hughes to "break down its long term practices into temporal components." (Pg. 1438). But, unlike the case at bar, there was good reason in Smith v. Hughes to refuse to break down the long term practices into temporal components. Although not recited by this Court of Appeals in its recitation of the facts in its opinion

in Smith v. Hughes, that reason is found in the District Court's decision (783 F.Supp 1222) where we learn that the proffered events in Smith v. Hughes were not entitled to be considered "sudden and accidental" because they were not infrequent. The District Court's decision in Smith v. Hughes reveals that "Hughes encountered periodic episodes where its waste treatment plant broke down or was over-capacitated." (at 783 F. Supp 1222, 1232, Footnote 14). (Emphasis added). WEBSTERS defines "Periodic" as "Re-occurring at regular intervals". Thus, in Smith v. Hughes, the proffered events were not infrequent, but rather they were "periodic episodes"; episodes "re-occurring at regular intervals". Said another way, in Smith v. Hughes the proffered events were *frequently* occurring events. Thus, the court in Smith v. Hughes rightly rejected the proffered events in that case.

However, in the case at bar here, as contrasted to the un-quantified but daily occurring drips and splashes, Perry could only recall three distinct large spills over a twenty five year period. Perry's Declaration shows that these three spills were not a part of the long term practices; they were not frequently repeated events. Just three events in over twenty five years of operations by Perry can hardly be said to be "periodic episodes", as the District Court found in Smith v. Hughes. In the case at bar, the three events offered to justify insurance coverage were not part of the normal operations, they were not events which were "re-occurring at regular intervals", they were not "periodic episodes". They were "infrequent" events! Each was, as Lumbermans teaches (at page 1428), "**a marked departure** from normal operations"! "Infrequent" events over a 25 year period cannot fairly be considered as "periodic"; yet that is exactly what the Courts below in the case at bar have done.

REASONS FOR GRANTING THE WRIT

Environmental clean up is a matter of grave importance to all. If the insurance industry does not pay their fair share under the policies that the industry has issued across this country, then the additional expense and added burden will fall on us all, whether as individuals or as tax-payers. In the case at bar, the evidence showed that there were four main causes of the pollution; one cause was not covered by insurance, but the other causes would warrant coverage, had not the Court of Appeals entered a decision that conflicts with a decision of the court of last resort of the State of California. The Court of Appeals has departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court as to call for the exercise of this Court's supervisory power.

The Courts below failed to follow United States v. Diebold, Inc., 369 US 654 and thus failed to afford Labour the benefit of all reasonable and logical inferences from the facts adduced. Furthermore, the courts below overlooked Montrose v. Superior Court and Vann v. Travelers and thereby failed to follow established California law. In so doing, the Courts below added a new and additional requirement to the insurance contract.

CONCLUSION

While paragraph 12 of the Perry Declaration offers a simplistic conclusion, upon which the insurance carriers have been only too happy to have the Courts below focus, the balance of the Perry declaration shows that there was evidence of "countering inferences" to support the contention that the

three spills were not part of the normal operations and that the pollution also resulting from these three spills was therefore "sudden and accidental". Thus, the claim in the decision by the Court of Appeals that the evidence is "uncontroverted" and "unequivocal" could only be made if the Court overlooked the evidence of "countering inferences" in the Perry Declaration which tends to establish that the three spills were **not** a part of normal operations. The Perry Declaration, when properly considered, does not establish the "absence of any potential for coverage", as Montrose v. Superior Court requires to justify summary judgment in California in favor of the carriers. Indeed, the Perry Declaration proves the existence of coverage based on the three spills in question. Labour deserved to have a trial in order to determine the extent of pollution caused by the un-quantified daily drips and splashes as compared to the pollution caused by the three large and infrequent "sudden and accidental" polluting events where hundreds of gallons of toxin were released into the environment. Under California law the court **must look not to whether noncovered acts predominate . . . but to whether there is any potential for liability.** (pg 1613). If the evidence shows that the pollution was caused **"in part, by a condition that developed so rapidly it could properly be described as a "sudden" event", then summary judgment is improper.** " Simply put, the Court of Appeals below failed to follow the law.

Although the decisions below are financially devastating to Labour, he is just but one individual. The decisions below, unless reversed, will fall heavily on us all. Unless reversed, the insurance industry as a whole will now be able to take great advantage of their insureds by citing the District Court's published decision and asserting the claim that

any amount of gradual pollution at a site from ongoing operations will defeat any claim for coverage under the "sudden and accidental" exception to the limited pollution exclusion, no matter how big the accident and no matter how unexpected the event. In the late 1970's and the 1980's the insurance industry sold a standardized policy which claimed they would cover damages for "sudden and accidental" pollution. The Courts below, by their decisions in the case at bar, have now added a new clause to those insurance contracts in favor of the carriers. Now an insured will not only have to show that pollution occurred as a result of a "sudden and accidental" incident, but the insured will also have to show that there is no evidence of any gradual pollution at the site, as well. Let there be no mistake about it, the insurance industry will benefit greatly from this decision; a decision which leaves in place a summary judgment in favor of the insurers while overlooking and ignoring established California law. This decision strips insureds of their rights to insurance coverage for "sudden and accidental" pollution under the policies in question, wherever some amount of "gradual" pollution may also have occurred.

Based on the foregoing, Petitioner/Appellant Labour respectfully requests this Court grant relief and issue its writ of certiorari.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
OCT 25, 1996

AMERICAN STATES INSURANCE COMPANY Plaintiff - counter - defendant - Appellee, v. SACRAMENTO PLATING INC.; RICHARD PERRY; ARLENE PERRY; DALE CARTER; RAR MARKETING INC; ALICE KAZANJIAN, Defendants, and ARTHUR LABOUR, Defendant -counter-claimant- Appellant, v. ROYAL INSURANCE COMPANY OF AMERICA, Counter defendant Appellee.	NO. 94 - 16905 D.C. No. CV- 93-569-WBS Memorandum*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding
Argued and Submitted September 16, 1996
San Francisco, California

Before: BEEZER and THOMPSON, Circuit Judges, and GILLMOR,** District Judge.

Arthur A. Labour appeals the district court's entry of summary judgment for American States Insurance Company ("ASI") and Royal Insurance Company ("Royal") in an action for declaratory judgment and breach of contract arising out of ASI's and Royal's refusal to provide coverage under several comprehensive general liability policies for costs associated with Labour's compliance with an "Imminent and Substantial Endangerment Determination and Order" issued by the California Environmental Protection Agency Department of Toxic Substances Control ("Cal-EPA Order") regarding environmental pollution on Labour's Property. The district court held that the "qualified pollution exclusions" found in the relevant ASI and Royal policies precluded coverage as a matter of law. We have jurisdiction pursuant to 28 U.S.C. § 1291. We conclude that the district court properly exercised jurisdiction over this matter, and we affirm as to all other issues raised on appeal.

I.

Royal asserts that Labour waived his right to challenge the summary judgment decision on appeal by filing a statement of nonopposition to Royal's motion in the proceedings below.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable Helen Gillmor, United States District Judge for the District of Hawaii, sitting by designation.

Where, as here, Labour consented to entry of summary judgment by the district court, "we have 'followed the practice of looking at the language of the consent judgment and other evidence in the record to determine whether a party may appeal following an order entered by consent.' " Paracor Finance, Inc. v. General Elec. Capital Corp., 1996 WL 552678 *15 (9th Cir. 1996) (quoting Blair v. Shanahan, 38 F.3d 1514, 1521 (9th Cir. 1994), cert. denied, -- U.S. --, 115 S.Ct 1698 (1995)); Shores v. Sklar, 885 F.2d 760, 762 (11th Cir. 1989), cert. denied, 493 U.S. 1045 (1990). It is apparent from the record that at least Labour and the district court believed that Labour had reserved the right to appeal from Royal's summary judgment, id., and Labour in fact exercised this right in a timely fashion by filing his notice of appeal on October 14, 1994, 30 days after the district court's September 14, 1994 entry of such judgment. See Fed.R.App.Proc. 4(a). We therefore conclude that Labour did not waive his right to appeal from the district court's entry of summary judgment in Royal's favor.[1]

II.

Before reaching the merits of Labour's appeal, we

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[1] Although less than clear, Royal appears to assert that Labour did not file a timely notice of appeal from the district courtis entry of judgment for ASI. ASI has not raised this issue. Even if ASI had, however, it should be resolved in Labour's favor. ASI's judgment, dated August 29, 1994, does not contain an express determination that there was no reason for delay, and it does not expressly direct entry of a final judgment. It therefore became final when the district court disposed of Labour's remaining crossclaims against Royal by judgment entered September 14, 1994. As discussed in the text above, Labour filed a notice of appeal on October 14, 1994, 30 days after entry of final judgment. The appeal was timely. See Kreines v. U.S., 959 F.2d 834, 836 (9th Cir. 1992).

consider whether the district court abused its discretion by exercising jurisdiction over the case. In deciding whether a district court abuses its discretion by entertaining a declaratory relief action, we consider whether "there are 'circumstances present to warrant an exception' to the general rule that the action belongs in state rather than federal court." Employers Reinsurance Corp. v Karussos, 65 F.3d 796, 799 (9th Cir. 1995) (quoting American National Fire Insurance Co. v. Hungerford, 53 F.3d 1012, 1019 (9th Cir. 1995)). In the instant case, the district court expressly weighed the factors bearing upon the discretionary exercise of federal court jurisdiction, and decided to retain the declaratory relief action. We conclude that the circumstances of this case did not obligate the district court to exercise its discretion to decline jurisdiction over the declaratory relief claims, especially in light of Labour's breach of contract counter-claims and cross-claims against ASI and Royal, respectively. Dismissal of the declaratory relief claims would have resulted in piecemeal litigation because the breach of contract claims would still be pending before the court. See Maryland Casualty Co. v. Knight, F.3d --, --, 1996 WL 544213 *4. In addition, dismissal at this stage will frustrate the interests of judicial economy because, as discussed below, the district court correctly decided the case on the merits. See id.

We now consider the appeal on its merits.

III

We review de novo a grant of summary judgment. Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine, disputed issues of material fact and whether

the district court correctly applied the relevant substantive law. Id.

On appeal, Labour contends that the district court erred in concluding that the evidence of the three tank spills in 1981, 1984 and 1985 did not raise a triable issue of fact as to whether a "sudden and accidental"' discharge caused part of the contamination at the Property. The relevant ASI and Royal policies contain qualified pollution exclusions which exclude from coverage all claims for injury or damage caused by a discharge, dispersal, release or escape of pollutants (a "discharge"), but except from this exclusion injury or damage caused by "sudden and accidental" discharges. Under California law, a "sudden and accidental" discharge is one that is abrupt, unexpected and unintended. See, e.g., Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 714, 755, 15 Cal.Rptr.2d 815 (1993). Gradual pollution is unambiguously excluded from coverage. ACL Technolouies. Inc. v. Northbrook Property & Casualty Ins. Co., 17 Cal.App.4th 1773, 1787, 22 Cal.Rptr.2d 206 (1993).

The insured has the burden of proving a claim is covered under an exception to an exclusion, Aeroquip Corp. v. Aetna Casualtv Surety Co.. Inc., 26 F.3d 893, 894-95 (9th Cir. 1994), and Labour presented no evidence from which it could be inferred that the soil contamination was caused by a "sudden and accidental" discharge. Even if the concrete floor was degraded prior to 1981, as Labour would have us infer, the three tank spills in 1981, 1984 and 1985 did not involve soil contamination caused by an abrupt, unexpected and unintended discharge. The uncontroverted evidence in the record indicates that these spills were not unexpected, and that at least one of these spills resulted from corrosion -- a

condition that was not abrupt, but rather occurred over time due to lack of maintenance. In addition, the occasional tank spills onto the floor occurred in the context of daily drippings and spills of toxic liquids onto the floor over many years. The district court, therefore, correctly applied Smith v. Hughes Aircraft, 22 F.3d 1432 (9th Cir. 1994). Labour's effort to break down their long term electroplating practices in handling the chemical fluids into temporal components must be rejected. Id. at 1438. The evidence unequivocally demonstrated that the spillage onto the floor occurred over a long period of time.

We conclude that the district court properly entered summary judgment in favor of ASI and Royal. Labour's proffered evidence of the three tank spills did not raise a triable issue of fact regarding coverage under any ASI or Royal policy.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 4, 1996

AMERICAN STATES INSURANCE COMPANY Plaintiff - counter - defendant - Appellee, v.	)	NO. 94 - 16905
	)	D.C. No. CV- 93-569-WBS
SACRAMENTO PLATING INC.; RICHARD PERRY; ARLENE PERRY; DALE CARTER; RAR MARKETING INC; ALICE KAZANJIAN, Defendants, and	)	ORDER
ARTHUR LABOUR, Defendant -counter-claimant- Appellant, v.	)	
ROYAL INSURANCE COMPANY OF AMERICA, Counter defendant Appellee.	)	

Before: BEEZER and THOMPSON, Circuit Judges, and GILLMOR,** District Judge.

The petition for rehearing is denied.

** Honorable Helen Gillmor, United States District Judge for the District of Hawaii, sitting by designation.